The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** G. Marine Diesel

**File:** B-232619.3

**Date:** August 3, 1989

## DIGEST

Where technical evaluation scheme in request for proposals sets forth prior experience and performance under prior contracts as an evaluation factor and awardee referenced in its proposal its performance under a major, ongoing contract with the contracting agency, reevaluation of proposals--undertaken after prior protest against award was sustained--was unreasonable where the agency ignored the problems encountered by the awardee in performing the contract since issuance of the prior decision sustaining the protest.

## DECISION

G. Marine Diesel (GMD) protests the determination by the Naval Sea Systems Command (NAVSEA) that the proposal submitted by the Pennsylvania Shipbuilding Company (PSC) under request for proposals (RFP) No. N00024-88-R-8502, for the overhaul and repair of three ammunition supply ships, was the proposal most advantageous to the government and that an earlier award to PSC thus should remain in place. This determination was made after a reevaluation of proposals undertaken pursuant to our decision in G. Marine Diesel; Phillyship, B-232619, B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90, in which we held that NAVSEA had not properly evaluated PSC before awarding that firm a contract.

We sustain the protest, but deny GMD's request that we recommend termination of PSC's contract. Instead, we recommend that the Navy not exercise any options under PSC's contract, and we find GMD entitled to recover both its proposal preparation costs and the costs of filing and pursuing the protest.

BACKGROUND/PRIOR DECISION

The solicitation listed the primary criteria for the evaluation of proposals, in descending order of importance,

(1) management capability, (2) technical approach, (3) cost, including probable cost to the government, cost realism and supporting cost data, and (4) resource availability. Prior experience and past performance were subcriteria under all but the cost criterion. Cost was listed as only the third most important criterion, but the actual importance of cost in the evaluation scheme was increased by the listing of cost control and avoidance as a subcriterion under each of the other three primary criteria. Under NAVSEA's undisclosed evaluation plan, offerors could receive up to 1,650 points for cost considerations, approximately 33 percent of the 5,000 total available award points.

In its evaluation of best and final offers (BAFO), NAVSEA questioned several aspects of PSC's cost proposal. The agency gave PSC the lowest cost realism score of any offeror, and a lower score for supporting cost data than either GMD or Phillyship, the third of four offerors. In particular, the agency concluded that PSC had not complied with the solicitation requirement for a cost breakdown that clearly traced the cost of each work item through the appropriate subtotals to the total of proposed costs. Furthermore, while PSC proposed the lowest cost ($69,044,298) of any offeror, NAVSEA found the probable cost of award to PSC ($71,912,464) to be only the second lowest, lower than GMD ($74,876,867), but higher than Phillyship ($66,963,416).

Notwithstanding its concerns with respect to PSC's cost proposal, however, NAVSEA determined that PSC's overall proposal was most advantageous to the government. The agency found that the proposal offered significant strengths in the areas of organizational approach, advance planning, planning and engineering manpower, prior technical and management experience, experience in providing necessary resources, and available facilities. In this regard, PSC received 532 of 625 evaluation points available under the experience and performance subcriteria, GMD received 423 points, and Phillyship received 352 points. As a result, PSC received a higher score overall (3,709 points) than either GMD (3,421 points) or Phillyship (3,407 points). Based upon this evaluation, NAVSEA made award to PSC on September 7, 1988.

After GMD and Phillyship protested the award, we reviewed the evaluation of proposals and found it inconsistent with the stated evaluation criteria and other requirements of the solicitation. In this regard, the RFP required offerors to summarize any prior experience and performance relevant to their ability to manage, control and perform the required overhaul and repair work and, in addition, to provide detailed information concerning manning, change orders, deficiency reports, and delays for each Navy contract completed during the last year and the last five Navy contracts over $3 million. The record indicates that in late 1987 PSC informed NAVSEA that it was experiencing financial difficulty, due to significant cost increases, in performing a fixed-price incentive contract with NAVSEA for the construction of four (two base and two option) fleet oilers; as a result, the cost of completion was expected to exceed both the target and ceiling prices. Concerned that PSC would be unable to continue operation and might file for protection under the bankruptcy statutes, NAVSEA suggested, and PSC agreed to the transfer of the two option ships to another builder; the assignment was effected after the closing date for submission of initial proposals under this solicitation, but prior to the receipt of BAFOs on July 20, 1988. While PSC cited the fleet oiler contract as relevant to consideration of its management and technical experience and the experience of its key personnel and noted that the contract was ongoing, the firm did not describe its performance under the prior contract and, specifically, did not discuss the serious financial performance problems it had encountered.

Nevertheless, given (1) the solicitation's emphasis on management capability, cost control and avoidance, and prior experience; (2) the relevance to these considerations of recent performance under a substantial, cost-type contract for related services; and (3) PSC's reference to, and the agency's familiarity with, the contract, we concluded in our decision that NAVSEA was required to consider in its technical evaluation PSC's performance under the fleet oiler contract, but apparently had failed to consider PSC's financial difficulties under that contract in rating the firm under the several evaluation categories that concerned prior performance. On the contrary, the record showed that agency evaluators had concluded without apparent reservation that PSC's management and technical experience represented a strength. In addition, we found that the agency had failed to score evaluated probable cost in accordance with the solicitation; this improper scoring accounted for 102 of PSC's 288-point scoring advantage relative to GMD. G. Marine Diesel; Phillyship, B-232619, B-232619.2, supra.

In considering the effect of these evaluation deficiencies, we took into consideration not only the fact that the prior experience subcriteria accounted for 625 (of the 5,000 total available) points, but also that PSC's fleet oiler experience could have additional relevance to an evaluation of the likely effectiveness of PSC's proposed approach to planning, management, and cost control and avoidance, and to an evaluation of the credentials of some key employees. Since we were unable to predict the scoring impact of the agency's failure to consider PSC's prior contract difficulties, and in view of PSC's remaining narrow, 186-point scoring advantage after recalculation of the probable cost scoring, we were unable to conclude that the source selection decision was a reasonable one. We therefore sustained GMD's protest and recommended that the agency reevaluate PSC's proposal with reference to the firm's fleet oiler contract experience.

REEVALUATION

NAVSEA reports that after receiving our decision it reconvened the Contract Award Review Panel (CARP) to reevaluate PSC's performance experience, taking into account the financial performance problems encountered under the fleet oiler contract, as described in an agency memorandum provided to the panel. Although this reevaluation identified certain unspecified "weaknesses and risks," resulting in a 115-point reduction in PSC's technical score for the experience and performance subcriteria, the CARP nevertheless concluded that these weaknesses and risks would not significantly impact PSC's ability to successfully perform the contract and, furthermore, determined that PSC's proposal remained technically superior overall. Since PSC's total revised score (3,551 points) remained 71 points higher than GMD's (3,480 points), and PSC's probable cost was evaluated as nearly $3 million less, the CARP advised the cognizant agency Acquisition Manager on February 2, 1989, that PSC's proposal remained the one most advantageous to the government.

NAVSEA also reports, however, that after conclusion of the reevaluation by the CARP, the Acquisition Manager became aware of additional information concerning the continuing financial performance problems PSC had been encountering under the fleet oiler contract since issuance of our prior decision on January 27. According to the agency, while the Acquisition Manager determined that "this information was not relevant to the reevaluation," and that PSC's proposal therefore remained the one most advantageous to the government, he nevertheless concluded that the additional information was relevant to whether the options under the protested contract should be exercised. As a result, the Acquisition Manager and the contracting officer determined on March 24 to affirm the original award to PSC, but not to exercise any options under PSC's ammunition ship contract unless PSC's performance under the fleet oiler contract improved. Moreover, NAVSEA informs us that, subsequent to the March 24 determination, and prior to the agency filing its report on this protest on May 12, the Acquisition Manager undertook a further review of "PSC's continued poor financial performance on ship repair and new construction work in PSC's yard" and that, as a result, the agency has determined not to exercise any options under the ammunition ship contract, and instead will compete all remaining program requirements.

ALLEGATIONS

In its protest, GMD questions whether the agency conducted a thorough reevaluation, taking full account of the effect that PSC's fleet oiler performance problems would have on PSC's capacity to perform the ammunition ship contract. GMD challenges NAVSEA's account that the contracting officials here learned of significant, additional information concerning PSC's performance under the fleet oiler contract only after the CARP had finished its reevaluation; according to the protester, the extent of PSC's performance problems already was apparent prior to award of the contract in September 1988, let alone at the time of the reevaluation.

ANALYSIS

We find that although NAVSEA was required under the solicitation evaluation scheme to consider in its technical evaluation PSC's performance under the fleet oiler contract, the agency, by its own account, failed to take into consideration the full extent of PSC's known, unsatisfactory financial performance when conducting the reevaluation. Again, according to NAVSEA, the Acquisition Manager and the contracting officer, who was designated the source selection official in the source selection plan, became aware of continuing deficiencies in PSC's performance, beyond those considered by the CARP, prior to the March 24 determination to reaffirm the award to PSC. The agency apparently considered this information concerning PSC's performance to be sufficiently serious that it called into question PSC's ability to perform; where the CARP had concluded that the weaknesses with respect to PSC's experience would not significantly impact PSC's ability to successfully perform the ammunition ship contract, the Acquisition Manager and the contracting officer determined that the exercise of options for additional work was then inappropriate in view of PSC's performance problems. Essentially, then, the agency determined that PSC properly had been awarded the contract but, at the same time, that it was not sufficiently qualified based on its prior performance for NAVSEA to even consider awarding PSC the options. We find these determinations incongruous.

NAVSEA argues that the Acquisition Manager reasonably considered the information on PSC's recent performance to be irrelevant to the reevaluation. We disagree. Federal Acquisition Regulation (FAR) § 1.602 requires contracting officers to safeguard the interests of the United States when entering into contractual relationships. We cannot conclude that it was in compliance with the mandate of FAR § 1.602 and reasonable under the solicitation evaluation scheme for the contracting officer, as the source selection official responsible for making the ultimate determination as to the relative merits of the proposals, not to take into consideration reasonably available information concerning PSC's continuing serious, financial performance problems under the fleet oiler contract, a substantial cost-type contract for related services. The fact that this information concerned PSC's most recent performance under the fleet oiler contract only enhanced its relevance, see, generally, The Aeronetics Division of AAR Brooks & Perkins, B-222516, B-222791, Aug. 5, 1986, 86-2 CPD ¶ 151 (recent unsatisfactory performance may call into question contractor's ability to perform); it certainly does not excuse the failure to consider relevant, reasonably available information.

Further, in this regard, it is not apparent from the record why the agency should not have already been aware of the significance of PSC's ongoing performance problems at the time of the reevaluation. Again, as early as late 1987, NAVSEA learned of PSC's serious financial performance problems, which ultimately led, in June 1988, to the assignment of PSC's contract for two of the fleet oilers. Moreover, both the assignment and the evaluation under this solicitation of PSC's fleet oiler performance subsequently became the subject of bid protests. American Shipbuilding Co., B-231845, Nov. 8, 1988, 88-2 CPD ¶ 454. Presumably, therefore, NAVSEA continued to closely monitor PSC's fleet oiler performance; the agency's realization that the performance continued to be unsatisfactory was subsequently evidenced by the agency's determination first to reduce PSC's score under the reevaluation by 115 points, and by its subsequent determination not to exercise any options under the contract in question here. Although NAVSEA claims that the determination to compete the remaining requirements was based upon new, additional information received only after the CARP completed its reevaluation, the agency has neither specifically described the additional information nor explained how the essential character and significance of PSC's performance had changed and why the information in fact was new.

In these circumstances, we conclude that the reevaluation was not reasonable, and we sustain the protest on this basis.

RECOMMENDATION

The solicitation established as the base quantity of work essentially only the preparation for the initial period of maintenance and repair of the USS Suribachi, one of the three ammunition ships. The actual, initial maintenance and repair of that ship, the two subsequent periods of maintenance and repair of that ship, and the six periods of maintenance and repair of the two other ships were only options and not part of the base quantity of work. NAVSEA advises us that the initial maintenance and repair work on the USS Suribachi--that is, the first option--is almost completed and that no further options have been exercised.

GMD requests that we recommend that PSC's contract be terminated for the convenience of the government and that award then be made to GMD as the next highest ranked offeror (at 3,480 points). We decline to do so.

NAVSEA has informed our Office that it has determined that it is in the best interests of the government that the requirement be resolicited on the basis of either fixed-price contracts for the overhaul and repair of individual ships or under an otherwise restructured maintenance program. In this regard, the contracting officer has broad discretion in deciding whether to cancel a solicitation, and need only have a reasonable basis to do so, see Gradwell Co., B-230986, July 7, 1988, 88-2 CPD ¶ 19; the need to revise the solicitation to be consistent with the agency's current needs may be a legitimate basis for cancellation. Telesynetics Corp., B-228916.4, B-228916.5, Aug. 2, 1988, 88-2 CPD ¶ 106.

In the circumstances, therefore, we conclude that termination of PSC's contract is not appropriate. Instead, we recommend that, as proposed by NAVSEA, no further options be exercised and that the requirement instead be resolicited on a basis consistent with the agency's current needs. In addition, since the effect of NAVSEA's actions has been to unreasonably exclude GMD from competition, we find GMD entitled to recover its proposal preparation costs. See, generally, Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300. We also find GMD to be entitled to the costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1988); see Sanford & Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266.

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States